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Tax Dispute Resolution in India - How to effectively handle?

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Income Tax in India - An overview

- 'Residents' taxed on worldwide income
- 'Non-residents' taxed on Indian sourced income
- 'Non-residents' taxed based on provision of the IT Act, 1961, or applicable DTAA, whichever is more beneficial
- Wide deeming provisions in the source based taxation rules
- Recent introduction of POEM and GAAR



Why tax disputes arise?

- Aggressive stand of the tax authorities especially high pitched tax assessments
- 'Fancy structures' created by taxpayers in order to gain tax savings / tax efficient transactions
- 'Contentious issues' leading to difference of opinion between tax authorities and tax payers
- Lack of clarity on new provisions coupled with aggressive interpretation by tax authorities / tax payers



Some notable controversies

Indirect transfer of Indian Assets

- Vodafone Issue - Retrospective Amendment
- Valuation rules notified recently
- Recent ruling of the Delhi ITAT in the case of Cairn India

'Royalty' payments

- Retrospective amendment
- Issue surrounding 'mobile software'

Share premium

- Excess premium added as 'income' of Indian target company

India-Mauritius Tax Treaty (Now amended)

- Eligibility of benefit under Article 13(4) of India-Mauritius Tax Treaty generally disputed by tax authorities



Common tax issues: The usual suspects

M&A transactions

- **Share sale:** Tax Treaty benefit & Indirect transfer of Indian assets
- **Asset sale:** Concept of 'undertaking'

Contractual matters

- Permanent Establishment
- 'Engineering, Procurement & Construction' contracts (AoP, demarcation of onshore/offshore contracts, etc)

Transfer pricing

- Global benchmarking
- Royalties
- Advertising, Marketing and Sales Promotion (AMP) expenditure

Impact of Retrospective Amendments

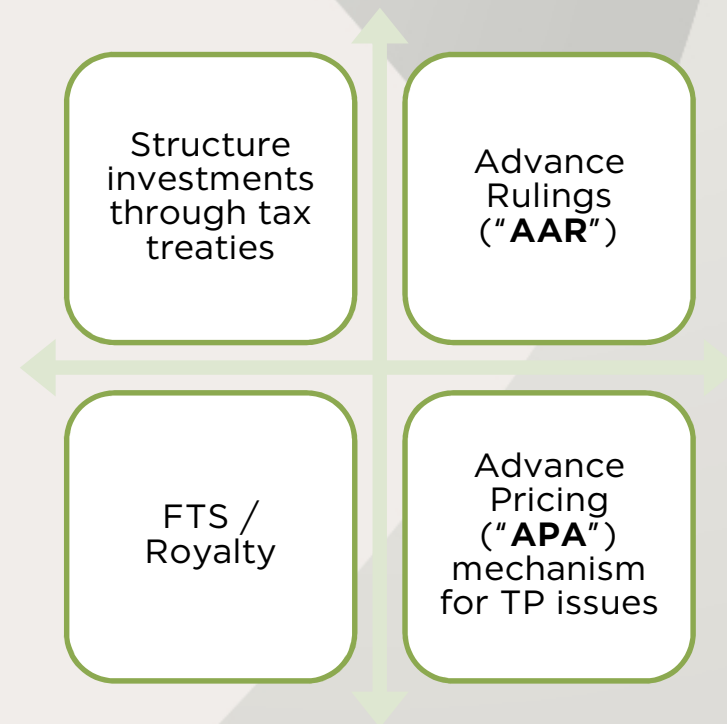


International taxation – key issues

Challenges



Opportunities

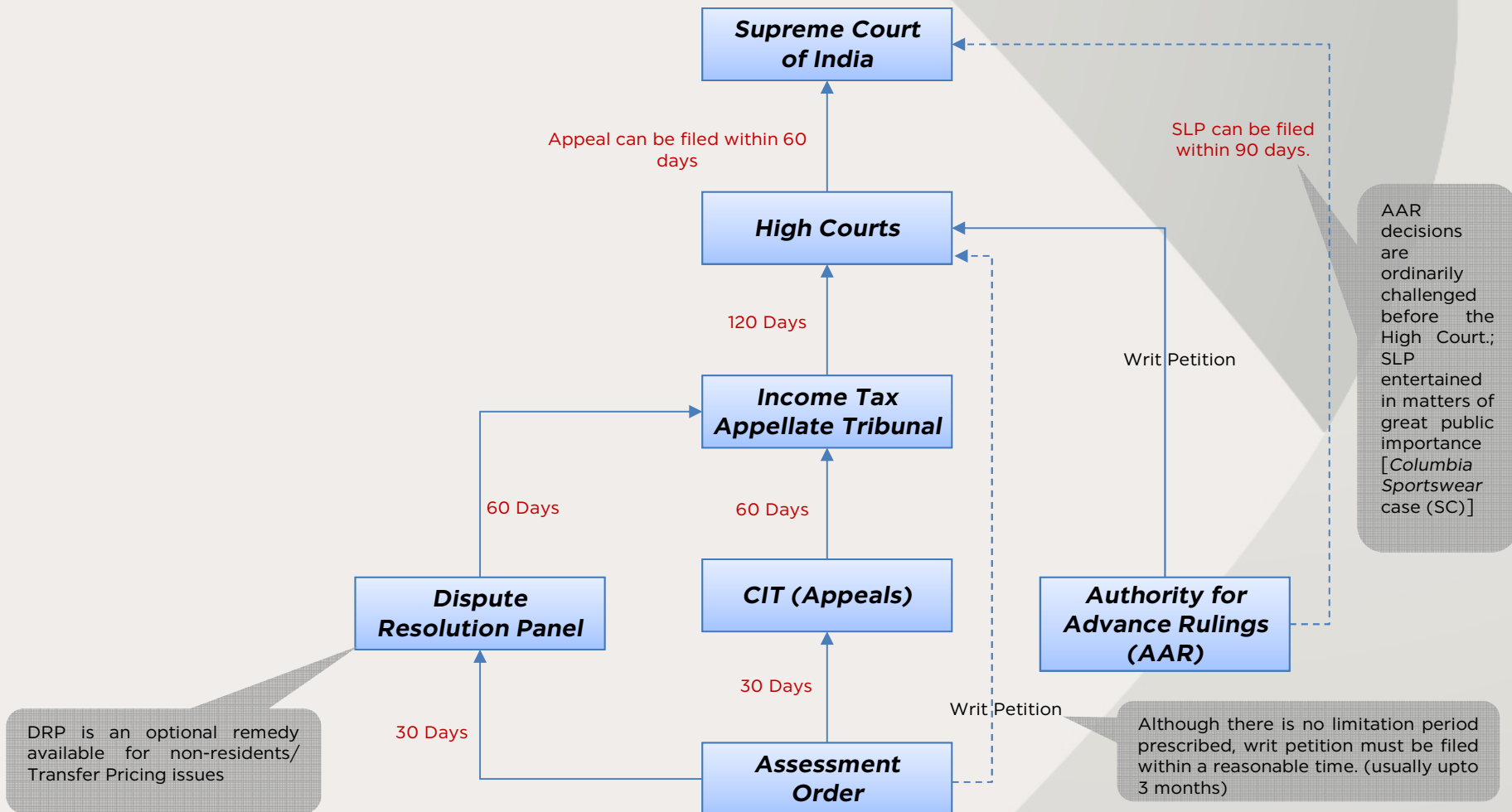




Dispute Resolution Mechanism



Hierarchy of forums for adjudication





Alternate Dispute Resolution Forums



Alternate Dispute Resolution Forums

- Authority For Advance Rulings (AAR)
- Dispute Resolution Panel (DRP)
- Income Tax Settlement Commission (ITSC)
- Advance Pricing Agreements (APAs)
- Mutual Agreement Procedure (MAP)



Alternate Dispute Resolution Forums

AAR

- Advance ruling can be obtained for a completed transaction as well as a proposed transaction, but not a hypothetical transaction
- Question raised must not be pending before any Income tax authority / Appellate Tribunal or any court
- Advance Ruling is binding on the tax authorities as well as the appellant
 - Writ petition / SLP against AAR Ruling??

DRP

- Applicable to :
 - matters concerning adjustments proposed by the tax officer in tax assessments of foreign companies and;
 - cases involving Transfer Pricing adjustments
- Provides the taxpayer an option to file objections against the draft assessment order framed by the Assessing Officer
- DRP has to pass directions within 9 months in relation to the draft assessment order
- Assessing Officer to pass a final order based on the directions passed by the DRP
- Such order can be directly appealed against before ITAT



Alternate Dispute Resolution Forums

ITSC

- Tax demands exceeding INR 1 million / INR 5 million in relation to year which is pending before tax authorities
- Order binding and final and cannot be appealed against (except by way of writ petition in deserving cases)
- Power to grant immunity against penalty and prosecution

APAs

- Agreement between Government and Taxpayer regarding arm's length price / methodology for transfer pricing matters
- Binding on taxpayer as well as tax authorities
- Valid for period specified in agreement (5 years) – Roll back provision available

MAP

- Special mechanism available under tax treaties for resolution of issues giving rise to double taxation or concerning interpretation of the tax treaty
- Resolution under MAP and domestic tax laws can be carried out simultaneously. Taxpayer has the option to accept or decline the resolution reached by the Competent Authorities

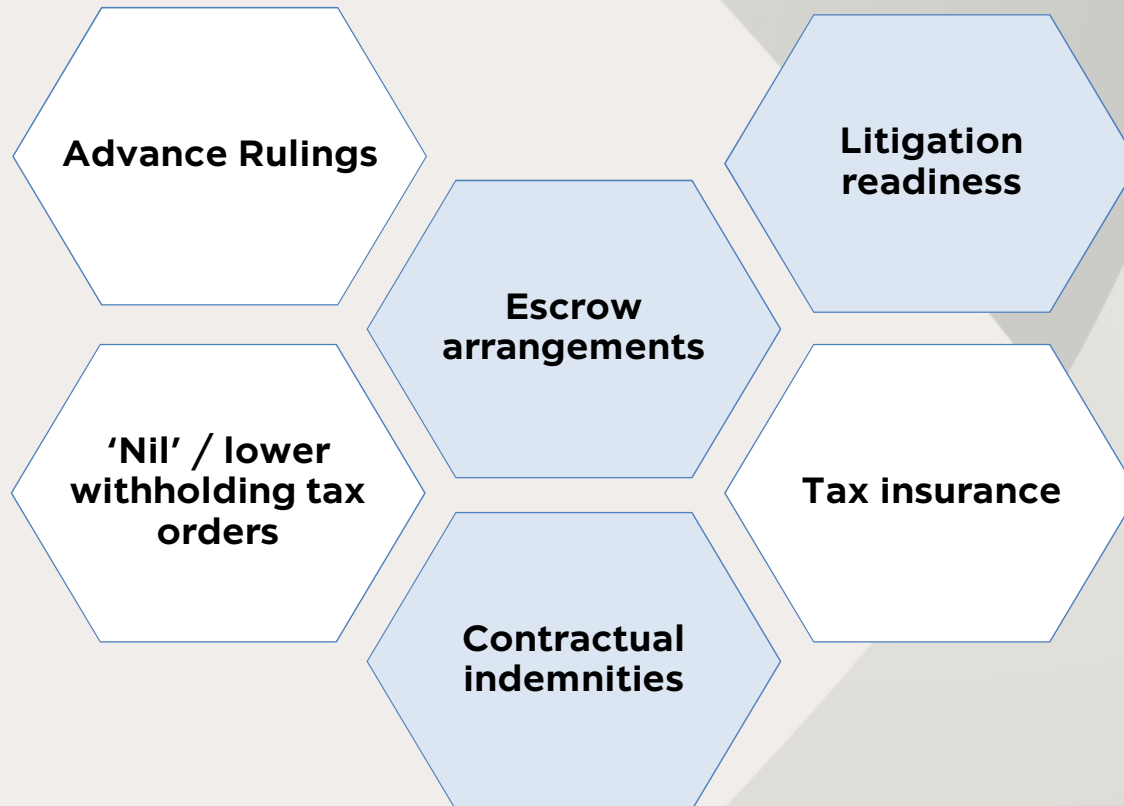


Some Risk Mitigation Strategies



Risk Mitigation Strategies

Possible options to mitigate risk





Some suggested strategies

Structuring

- There is no substitute for thorough legal and tax structuring at the outset
 - Involve tax lawyers with litigation experience to **consider the “worst case” outcomes** and to undertake scenario analysis
 - Interpret the law rationally
 - Take balanced view
-

Document terms

- Document the commercial intention clearly
 - Consider the use of contractual protections such as indemnities or tax insurance, although these are mitigation strategies and may not address all the concerns
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Advance rulings

- Assess the value of this option, in light of the likely approach of the tax authorities and the timelines involved
- Make effective and strategic representations before the AAR



Nil / lower withholding tax certificates

	SECTION 195(2)	SECTION 195(3)	SECTION 197
Applicant	Payer	Recipient (subject to certain conditions)	Recipient
When to apply	When whole of such income is not taxable and the proportion of taxable income is to be determined	When tax is not required to be deducted	When tax is not required to be deducted or tax is to be deducted at a lower rate
Nature	Order	Certificate	Certificate
Whether appealable	Yes, under section 248 of the IT Act to CIT(A)	No Writ petition may be considered under Article 226	No Writ petition may be considered under Article 226

Certificate issued under Section 197/195 is not conclusive /final in nature



Effectively dealing with tax litigation in India – Preventive measures

- Full disclosure of facts, information and documents to be brought on record
- Effective and proactive representation before tax authorities
- File additional written submissions / arguments depending on development during litigation
- Put in place a “fall-back” strategy at the outset to deal with any commercial implications
 - When request for ‘Nil’ withholding tax certificate is rejected by tax authorities – Writ Petition?
 - Consider alternative of seeking advance ruling from AAR



Effectively dealing with tax litigation in India – Curative measures

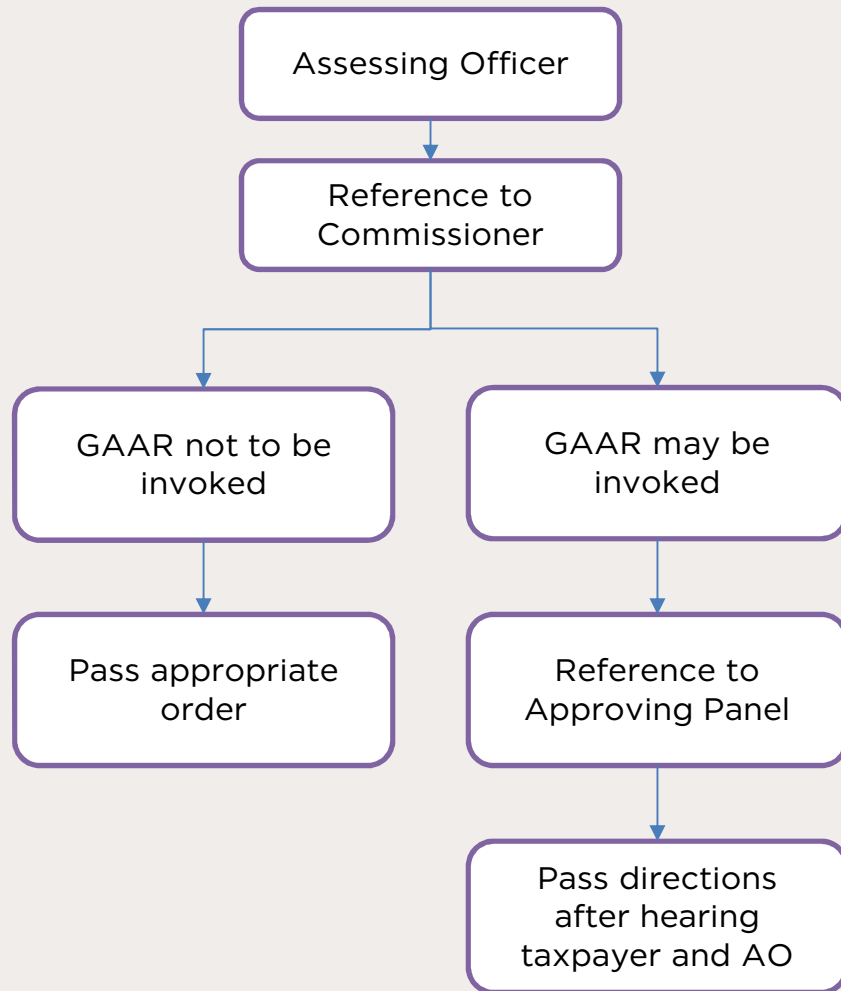
- Approach higher authorities apprising them of merits of the case with supporting documents (in high pitched/unfair assessments)
- Approach CIT(A) for stay of demand if regular assessing officer (and higher ups) do not grant stay on contentious tax demands despite merits and justifiable case
- Approach High Court by way of 'Writ Petition' if a case so warrants (specially, in cases of addition under Section 68 – unexplained cash credits, reopening of completed tax assessments, etc)
- 'Build your case' for ITAT by drafting high quality self speaking written submissions capturing full facts / applicable legal position, arguments supporting your case along with relevant tax rulings, if any
- Seek early hearing of pending dispute from CIT(A) / ITAT



Some Recent Developments



Approving Panel | Process for invoking GAAR



Some important points:

- AO to make a reference on the basis of material available on record during assessment and reassessment proceedings
- Commissioner to provide taxpayer opportunity to submit objections and hearing
- Approving Panel consist of three members including a Chairperson being a High Court judge
- Directions of Approving Panel binding on taxpayer and tax authorities. No appeal under the IT Act.
 - Writ petition?



Some Recent Amendments & Developments

Finance Act, 2017

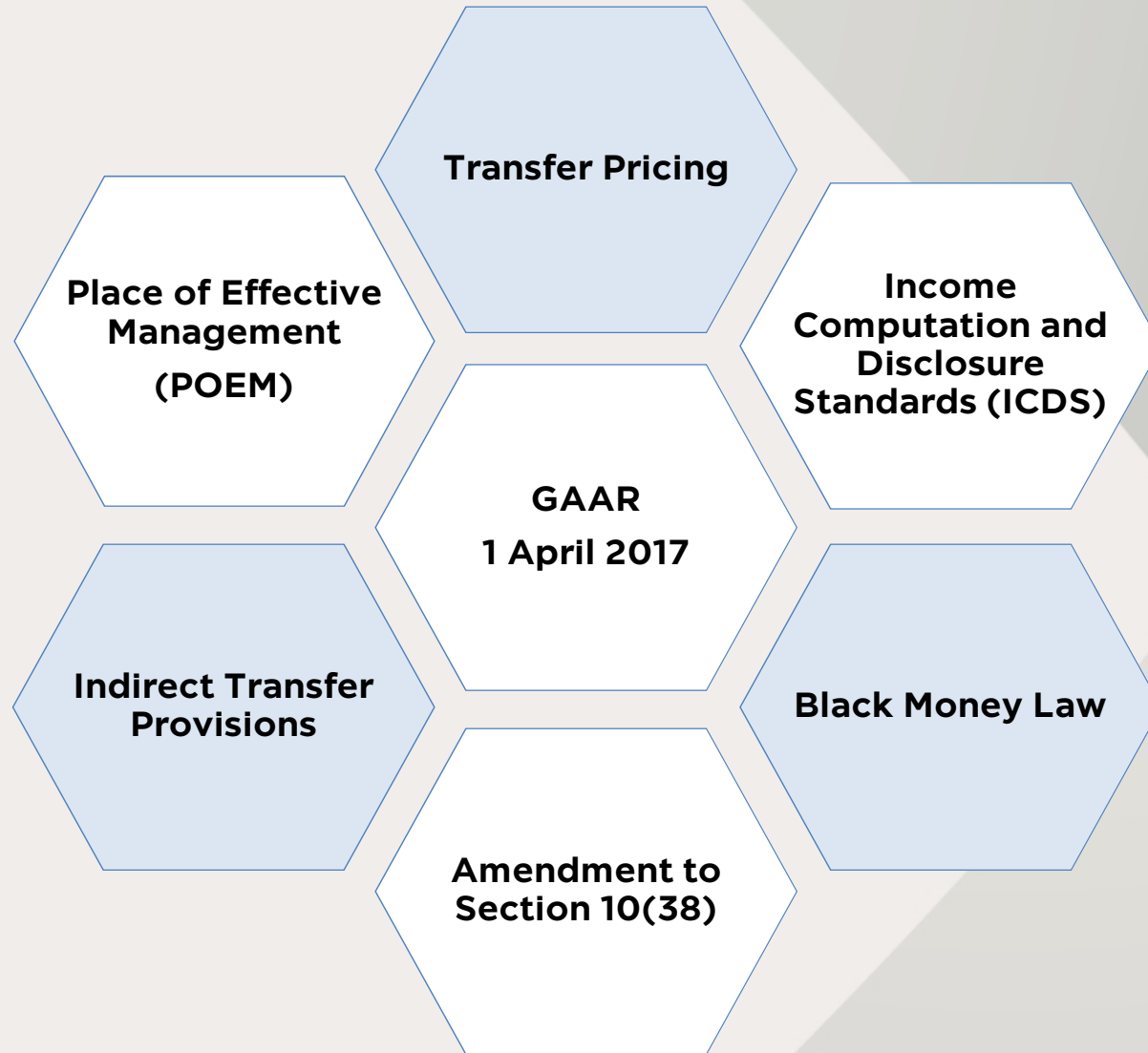
- Widened Power of Search and Seizure
 - No requirement to disclose “reason to believe” or “reason to suspect” prior to conducting a search or making a requisition
 - Provisional attachment of property of the taxpayer for a period of 6 months, to protect the interest of revenue and safeguard recovery in search cases
 - Reopening of assessments up to 10 assessment years in search cases subject to certain conditions

Finance Act, 2016

- Amendment to penalty provisions
 - 50% - for under-reported income
 - 200% - for misreported income
- Committee set up for approving any action taken by an assessment officer in relation to income arising on the indirect transfer of assets



Potential triggers to litigation





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